

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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In the Matter of )

Implementation of Section 207 of the )

CS Docket No. 96-83

Restrictions on Over-the-Air )  
Reception Devices: Television Broadcast )  
and MultiChannel Multipoint Distribution )  
Service )

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ISSUES AND POSITION STATEMENT

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COME NOW, THE CAUGHLIN RANCH HOMEOWNERS' ASSOCIATION, A NEVADA NON-PROFIT CORPORATION, RENO, NEVADA (the "Association"), by and through its General Manager, Michael Trudell, and submit herewith the Association's Issues and Position Statement as set forth herein below. The Association raises the following issues and takes the following positions:

**ISSUE:**

The Commission has proposed a specific rule (Appendix A), in accordance with the Telecommunications Act of 1996, Section 207, to wit: "pursuant to Section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service or direct broadcast satellite services." Paragraph (c) of Appendix A states:

No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming signals from over-the-air television broadcast of multichannel multipoint distribution service.

**POSITION:**

The Association's Declaration of Protective Covenants Caughlin Ranch, recorded as Document No. 942122, Official Records, Washoe County, Nevada (the "Declaration", enclosed and marked as Exhibit A), is intended to restrict activities on the properties within the Caughlin Ranch Planned Community to the extent that they impact the

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enjoyment, use and value of properties within our community. The Declaration places burdens on the property that are known to the buyer at the time they purchase the property. The homeowners who have purchased properties in the Caughlin Ranch Planned Community expect that the restrictions will be enforced to protect the enjoyment, use and value of each homeowner's property.

The Proposed Rule, paragraph (c), usurps the protection guaranteed to the homeowners who knowingly entered into the Covenants with the Association and rely on the terms of the agreement. The effect of the Proposed Rule is to undermine the sanctity of the contractual agreement between all of the parties.

Furthermore, in a Separate Statement of Commissioner James H. Quello, he writes:

I write separately to underline my concern that this clear Congressional intent could be applied overbroadly to private, non-governmental provisions in restrictive covenants and homeowners' association rules that run to the placement of over-the-air television and MMDS reception devices. (Enclosed and marked as Exhibit B).

The Association agrees with Commissioner Quello on several key points, as referenced in his statement:

- The Commission's interpretation of Congressional intent is being overbroadly applied to private, nongovernmental provisions in restrictive covenants and homeowners' association's rules.
- Nongovernmental restrictions should only be preempted if it precludes reception of the desired signal.
- The Commission's rule is potentially overbroad in the context of restrictive covenants or similar private agreements, "because these are generally entered into knowingly and as a private contractual matter by the purchaser".

**ISSUE:**

*The Order and Further Notice* reportedly analyzes the Commission's authority to preempt non-federal regulation in the area, and sets forth a rule based on a rebuttal presumption of unreasonableness rather than a per se preemption. More over, noting that Section 207 expands the range of preemption to include non-governmental entities such as homeowners' associations, *the Order and Further Notice* proposes a per se preemption of restrictions imposed by nongovernmental entities as they affect reception of DBS signals.

**POSITION:**

The presumption of "unreasonableness" should not applied to the Association, in view of the facts. The Board of Directors of the Caughlin Ranch Homeowners' Association (the "Board") have given careful consideration to the change in the technology for satellite communications and the reception of DBS signals. In October of 1995, the Board instructed Association staff to send out a ballot to all Association members to amend Section III, paragraph L. "Antennas", of the Declaration. Please refer to the attached Exhibit C, as a sample of the ballot to amend the Declaration. In demonstration of the homeowners' desire to ensure protection by the Declaration to allow only devices that can be permanently screened, 70% of the Class "B" members of the Association have affirmatively voted to amend Section III, paragraph L. of the Declaration, as noted in the ballot. The Board is in the process of recording the amendment to the Declaration.

The intent of the Association's restriction on "Antennas" is to ensure that the devices are permanently screened. It is the Association's understanding that the devices can be permanently screened without "impairing" the reception of DBS signals. Accordingly, the Association's restriction is not "unreasonable" and should be allowed to be enforced to ensure the protection of each homeowners' enjoyment, use and value of their property.

**ISSUE:**

Pursuant to the 1996 Act, in the Notice of Proposed Rule-making, the Commission propose a rule regarding prohibitions of restrictions on antennas and other means of receiving TVBS and MMDS over-the-air video programming signals that is similar to the rule for DBS.

**POSITION:**

Section 207 states (in part), "The Commission shall ... promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multi-point distribution service or direct broadcast satellite services" (emphasis added). The proposed interpretation of the Commission is to require that all types of video programming services must be granted unimpaired access to viewers. The term "or" used in Section 207, means any of the alternative types of video programming services not necessarily all of the various types of video programming services.

It is the Association's intent to allow "unimpaired" reception of DBS signals via permanently screen devices. However, it is the Association's understanding of Section 207, that it may continue to

restrict other "devices" which cannot be permanently screened.

Accordingly, the Association requests that the Proposed Rule, paragraph (c), be amended to clarify that as long as the homeowners' association allows devices or the unimpaired reception of at least one type of video programming signal, it may restrict other types of devices.

**ISSUE:**

The Commission has acknowledged that Congress intended that the Commission be cognizant of appropriate local concerns. The *Order and Further Notice* establishes a presumption that restrictive state or local regulations are unreasonable, and therefore preempts them, if they affect the installation, maintenance, or use of a satellite earth station antenna that is one meter or less in diameter. Furthermore, the local agency cannot overcome the presumption on aesthetic grounds. Such a request must show local concerns of a highly specialized or unusual nature, and must include the particular regulation for which waiver is sought. The Commission noted, "some examples of circumstances that might warrant consideration of a waiver, depending on the circumstances and on how other types of antennas or modern accoutrements are treated, are genuine historic districts, waterfront property, or environmentally sensitive areas." It is emphasized that "this list is not exhaustive nor is it determinative."

**POSITION:**

The Caughlin Ranch Planned Community is a private area of "local concern." The community has been constructed under strict control and development standards, identified in the Caughlin Ranch Master Plan and Development Standards Handbook. (Enclosed and marked as Exhibit D). The Association was created to facilitate the implementation of the Master Plan and ensure homeowners', developers', and contractors' compliance with the development standards and Declarations. Considerable expense has been taken to preserve the aesthetics of the Caughlin Ranch community, regarding: architecture, underground utilities, recreational facilities, etc. Having antennas attached to chimneys, facia, front yards, sides of buildings, runs contrary to the development standards of the Association.

It needs to be noted that in accordance with Nevada Revised Statutes, Chapter 278A, and Reno Municipal Code, Section 18.06.285, the Caughlin Ranch Master Plan and Development Standards Handbook, by definition, constitutes the Planned Unit Development (PUD) zoning for the Caughlin Ranch properties in the City of Reno. Without further clarification of the Commission's Proposed Rules, the Association may be unduly burdened with legal fees to prove

City of Reno. Inasmuch as that state and local governments are granted rebuttal and waiver rights, the Association should have rebuttal and waiver rights under the proposed rules.

In addition, although the Commission does not recognize the waiver request for state and local governments based on aesthetic grounds, the Association requests that the Commission consider "aesthetics" of the Caughlin Ranch Planned Community as a "local concern". It is the Association's understanding that the Commission intends to provide similar consideration to historic districts, waterfronts and other environmentally sensitive areas. Since one of the primary functions of the Association is to preserve the aesthetic character of the Caughlin Ranch Planned Community by enforcing the provisions of the Master Plan and Development Standards Handbook, the Association requests that "aesthetics" be incorporated in the Proposed Rules under special circumstances.

**ISSUE:**

The Commission intends to allow antenna users and local governments the right to pursue remedies in federal and state courts, if the wish to forego Commission review. However, the Commission has tentatively concluded that it is appropriate to accord private, nongovernmental restrictions considerably less deference than it grants restrictions imposed by state and local governments, and we accordingly, proposes a rule that denies to such entities the rebuttal and waiver provisions it provides for state and local governmental entities.

**POSITION:**

The Association agrees with Commissioner Quello that this is an overbroad application of the Congressional intent.

Furthermore, the Association feels that the proposed rule and the Commission's proposed actions are a denial of the Association's right to due process.

CAUGHLIN RANCH  
HOMEOWNERS ASSOCIATION


  
Michael Trudell  
General Manager

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Caughlin Ranch Homeowners' Association, a Nevada Non-Profit Corporation, Reno, Nevada, and have been authorized by the Board of Directors of the Association to forward these Issues and Positions in response to your request for comments in these proceedings, and on the 4th day of May, 1996, I sent by Federal Express an original and 11 copies of said Issues and Positions postage prepaid, addressed to:

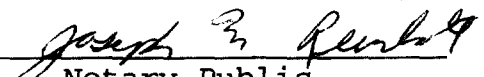
Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

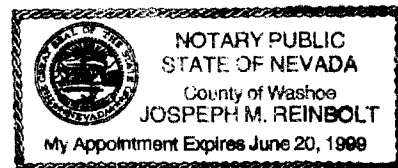
Dated this 4th day of May, 1996.

  
\_\_\_\_\_  
Michael Trudell, General Manager  
Caughlin Ranch Homeowners' Association

STATE OF NEVADA       )  
                              )  
COUNTY OF WASHOE    )       SS.

On this 4 day of May 1996, personally appeared before me, a Notary Public, Michael Trudell, known to me to be the General Manager of the Caughlin Ranch Homeowners' Association, a Nevada non-profit corporation, who acknowledges to me that he executed the foregoing on behalf of said corporation.

  
\_\_\_\_\_  
Notary Public



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APPENDIX A

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Proposed Rule:

- (a)(1) Any state or local zoning, land-use, building, or similar regulation, that affects the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service shall be presumed unreasonable and is therefore preempted subject to paragraph (a)(2). No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (b), or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to paragraph (a)(2).
- (2) Any presumption arising from paragraph (a)(1) of this section may be rebutted upon a showing that the regulation in question:
  - (A) is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself; <sup>6</sup>
  - (B) is no more burdensome to television broadcast service or multichannel multipoint distribution service reception device users than is necessary to achieve the health or safety objective; and
  - (C) is specifically applicable on its face to devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service.
- (b) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.
- (c) No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming signals from over-the-air television broadcast or multichannel multipoint distribution service.

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EXHIBIT A

DECLARATION OF PROTECTIVE COVENANTS

CAUGHLIN RANCH MAY 06 1996

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DECLARATION OF PROTECTIVE COVENANTS

CAUGHLIN RANCH

THIS DECLARATION is made on August 6, 1984 by  
JUNIPER TRAILS DEVELOPMENT CO., a Nevada corporation (the  
Declarant).

RECITALS

Declarant is the owner of that certain real  
property located in the County of Washoe, State of Nevada,  
described in the Supplemental Declaration attached hereto as  
Exhibit "A" and made a part hereof and contemplates  
developing the same into lots and parcels.

Declarant intends to sell and convey lots and  
parcels within Exhibit "A" and before doing so, desires to  
impose upon them mutual and beneficial restrictions,  
covenants, equitable servitudes and charges under a general  
plan or scheme of improvement for the benefit of all of the  
lots and parcels therein and the owners and future owners  
thereof.

NOW, THEREFORE, Declarant declares that all of the

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Exhibit "A" land and all the lots and parcels therein, as hereinafter defined are held and shall be held, conveyed, hypothecated or encumbered, leased, rented, used, occupied and improved, subject to the provisions of this Declaration, all of which are declared and agreed to be in furtherance of a plan for the development, improvement and sale of said lots and parcels, and are established and agreed upon for the purpose of enhancing and protecting the value, desirability and attractiveness thereof. The provisions of the Declaration are intended to create mutual equitable servitudes upon each of said lots and parcels in favor of each and all other lots and parcels; to create reciprocal rights between the respective owners of all such lots and parcels; to create a privity of contract and estate between the grantees of such lots and parcels, their heirs, successors and assigns; and shall, as to the owner of such lot or parcel, his heirs, successors or assigns operate as covenants running with the land for the benefit of each and all other such lots and parcels in the development as hereinafter defined and their respective owners, present and future.

I. DEFINITIONS. The following terms as used in this Declaration are defined as follows:

A. "Articles" means the Articles of Incorporation of the Association.

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B. "Association" means Caughlin Ranch Homeowners Association, the property owner's association which is a Nevada nonprofit corporation.

C. "Board" means the Board of Directors of the Association.

D. "By-Laws" means the By-Laws of the Association.

E. "Committee" means the Caughlin Ranch Architectural Committee.

F. "Common Area" means all of the real property designated as such in the Supplemental Declaration; all real property which may be later described by supplemental declarations as common area; and all real property acquired by the Association, whether from Declarant or otherwise, together in each instance with all improvements which may at any time be constructed thereon and owned by the Association, including, but not limited to recreational and community facilities, lakes, parks, paths and trails. Common area, as used in this Declaration does not include land owned in common or held in undivided interests by owners of multiple family dwellings within the development.

G. "Declarant" means the Declarant above named and any other developer of any portion of the Caughlin Ranch, its successors and assigns.

H. "Declaration" means this Declaration of Protective Covenants and any amendments hereto.

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I. "Development" means all that real property situate in the County of Washoe, State of Nevada, described in the Supplemental Declaration and all other real property which may be described in additional supplemental declarations recorded from time to time with the Washoe County Recorder, which development is commonly known as the Caughlin Ranch.

J. "Improvements" means all buildings, outbuildings, streets, roads, trails, pathways, driveways, parking areas, fences, retaining and other walls, docks, piers, landscaping, light standards, antenna and any other structures of any type or kind.

K. "Land Owned in Common" means land owned in common or held in undivided interests by the owners of multiple family dwellings.

L. "Lot" means any numbered single family lot shown on a map, or any living unit in a multiple family area shown on a map. Land owned in common as part of a multiple family dwelling shall not be considered to be a separate lot for purposes of this Declaration.

M. "Map" means the maps of the development as they are from time to time recorded.

N. "Multiple Family Dwelling" means a residential structure such as a townhouse or condominium structure containing two or more individual apartments or living units

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and constructed on a lot or parcel whose use is designated in the Supplemental Declaration as multi-family residential.

O. "Owner" means:

1. Any person or legal entity, including Declarant, who holds fee simple title to any lot, unit, or parcel within the development.

2. Any person or legal entity who has contracted to purchase fee title to a lot pursuant to a written agreement recorded in the Washoe County, Nevada Recorder's Office, in which case the seller under said agreement shall cease to be the owner while said agreement is in effect; or

3. A lessee of a lot under a recorded lease from the owner of fee simple title to said lot for a term of not less than fifty (50) years, in which case the lessor under said lease ceases to be the owner while said lease is in effect.

4. Owner does not include the Association.

P. "Parcel" means any portion of the development other than a lot or common area.

Q. "Single Family Dwelling" means a residential structure for the owner and his immediate family, his casual guests and his domestic servants and domestic employees, which dwelling is constructed on a lot designated in the Supplemental Declaration as a single family residential lot.



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R. "Supplemental Declaration" means:

1. The recorded Supplemental Declaration of Declarant attached hereto as Exhibit "A"; or

2. In the case of parcels being subsequently annexed to the development, the recorded Supplemental Declaration of a Declarant which incorporates the provisions of this Declaration therein by reference.

In either event, the Supplemental Declaration shall include a description of the real property covered thereby subject to the provisions of this Declaration and shall designate the permitted uses of such property.

II. LAND USE. Lots and parcels in the Supplemental Declaration shall be designated therein as to their permissible uses and shall thereupon become subject to the restrictive or other provisions of this Declaration relating to such uses. In the event a use is designated for which no such provisions are contained herein (e.g., single family dwelling, multiple family dwelling, etc.), the same may be set forth in such Supplemental Declaration. Only activities connected with the designated uses may be carried out on any lot or parcel. There shall be no use of a lot or parcel other than the designated use.

A. Single Family Residential. Only single family dwellings and such outbuildings as are usually accessory

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thereto and as may be permitted by the Committee shall be permitted on any lot designated as single family residential. The following restrictions shall apply specifically to such lots.

1. Minimum Area. Each dwelling constructed shall have fully enclosed floor area (exclusive of roofed or unroofed porches, terraces, garages, carports, guest houses or other outbuildings) not less than fourteen hundred (1,400) square feet.

2. Height Limitation. No structure or portion thereof (except chimneys) constructed on any lot within the development shall extend to a point higher than that designated for such lot on an applicable supplement to this Declaration of Protective Covenants filed with the Washoe County Recorder from time to time with respect to each unit of the development, which supplement shall be so filed prior to the Declarant conveying any lots within any such unit. In the absence of such filing, height limitations within any unit shall be those for each lot within such unit established by the Committee.

3. Building Envelope: The Declarant shall establish a building envelope and recommended point of access for each lot. This envelope will be

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based upon the topography of the lot, it's relationship to neighboring lots, and any unique feature that the lot may have such as trees, meadows, rock outcroppings, etc. The size and shape of the building envelope may vary from lot to lot. If, in the opinion of the Declarant certain lots do not warrant the establishment of a specially designated envelope, the envelope for those lots shall be set according to the normal setbacks of the governing local agency for that type of lot. In general, all building construction shall be confined to the building envelope area. If, in the opinion of the Committee, the building envelope shall cause the lot owner undue hardship in locating his home or accessory improvements, variances may be permitted by the Committee. Any such variance must be in writing and signed by the chairperson of the Committee.

B. Multiple Family Residential. Only multi-family dwellings and such outbuildings as are usually accessory thereto shall be permitted on any parcel designated as multiple family residential. The following restrictions and covenants shall apply specifically to such lots or parcels:

1. Location. Multiple family residential use shall be allowed only within areas approved for

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such use and as designated on supplemental declarations.

2. Minimum Living Area. The amount of fully enclosed floor area devoted to living purposes in each such unit shall not be less than eight hundred (800) square feet for an apartment, patio home or condominium unit or one thousand (1,000) square feet for a townhome.

3. Carport, Garage or Screened Parking Area. A carport or garage shall be constructed for each townhome unit. Screened parking areas in lieu of or in combination with garages or carports may be allowed for apartments, patio homes or condominium units if approved in writing by the Declarant and the Committee.

4. Areas Held in Undivided Interests Within Multiple Family Residential Parcels (referred to above as land owned in common). Areas held in undivided interests within multiple family residential parcels shall not be conveyed to the Association but shall be owned, developed and managed consistent with the development plan or scheme for the multiple family residential parcels.

5. Draperies in Multiple Family Residential Units. The Committee may, prior to the sale of any

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units in a multiple family residential unit structure establish a uniform color scheme for all drapery liners on exterior windows. In the event such a color scheme is established, the Committee shall notify the developer of such units who shall be obligated to notify the individual purchasers prior to purchase of this requirement. Failure of the developer to notify the individual purchasers shall not relieve such purchasers of the obligation to comply with the color scheme requirement. Such color scheme shall be maintained until changed by the Committee with the consent of seventy percent (70%) of the owners of the structure involved.

C. Common Areas. All areas in the development designated as common areas (owned and to be owned by the Association) are and shall remain private property and Declarant's recordation of a map showing such common areas shall not be construed as a dedication to the public of any such common areas located therein.

1. Ownership. Declarant will convey all such common areas to the Association (except as set forth herein) free and clear of all liens and encumbrances (other than liens for taxes), but subject to such easements and rights-of-way as then appear of record, such conveyances shall be

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accomplished in segments from time to time as improvements, if any, to be located thereon as shown on the recorded maps of the development are completed.

2. Use. The use and enjoyment of said common areas and improvements thereon, whether before or after conveyance to the Association, shall be subject to the powers of the Association as set forth in its articles and by-laws and to such rules and regulations governing the use of such property and improvements as may from time to time be adopted by the Board of the Association.

3. Maintenance. Maintenance of such common areas and repairs to any improvements thereon shall be the obligation and responsibility of Declarant until conveyance thereof to the Association; thereafter, the Association shall have sole responsibility therefor.

4. Subsequent Dedication. At any time after conveyance to the Association of any common areas, the Association may, upon the affirmative vote of seventy percent (70%) of its memberships offer any such property for dedication to public use. Such offer shall be subject to acceptance by the appropriate governmental authority pursuant to its then

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applicable standards. During the period of control of the Association by Sam Jaksick, Jr. or Alan Means, or the survivor of them or their successors, as set forth hereinafter in Section V.B., none of the common areas of the Association shall be offered for dedication.

III. RESIDENTIAL RESTRICTIONS. The following shall be applicable to all lots and parcels within the development, whether single family or multiple family, and each owner, as to his lot or parcel, covenants to observe and perform the same:

A. Accessory Outbuildings. No accessory outbuildings (e.g., garages or sheds) shall be erected on any lot or parcel prior to the erection thereon of a dwelling. In no event shall any temporary structure or trailer or tent ever be used for human occupancy or habitation. Only such guest houses or servants quarters as may be approved in writing by the Committee as an accessory outbuilding may be used for human occupancy or habitation. Unattached accessory outbuildings may be constructed only as may be approved in writing by the Committee.

B. Completion of Construction. Construction of any improvement, once commenced, shall be pursued diligently to completion. Improvements not so completed or upon which construction has ceased for ninety (90) consecutive days or

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which have been partially or totally destroyed and not rebuilt within a reasonable period shall be deemed nuisances. Declarant or the Association may remove ay such nuisance or repair or complete the same at the cost of the owner provided the owner has not commenced required work within thirty (30) days from the Association or the Declarant posting a notice to commence such work upon the property and mailing a copy of such notice to the owner at the address appearing on the books of the Association. Such notice shall state the steps to be taken to eliminate the nuisance. Neither the Association nor Declarant nor any of their agents, employees or contractors shall be liable for any damage which may result from any maintenance work as performed, nor shall the Association or Declarant, or any of their agents or employees, be liable for any failure to exercise the right to also maintain any parcel or lot.

C. Prohibition Against Used Structures. No used or existing or previously constructed buildings or structures, intended for use as a dwelling or outbuilding, shall be placed on any lot from the date of recording this Declaration.

D. Maintenance of Lots. All lots and parcels, whether vacant or improved, occupied or unoccupied, and any improvements placed thereon, shall at all times be maintained in such manner as to prevent their becoming unsightly,



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unsanitary or a hazard to health. If not so maintained, the Association shall have the right, after giving thirty (30) days written notice in like manner as above set forth in Subparagraph B, through its agents and employees, to undertake such work as may be necessary and desirable to remedy the unsightly, unsanitary or hazardous condition, the cost of which shall be added to and become a part of the annual assessment to which such lot is subject. The Board of Directors has sole descretion as to what is unsightly or unsanitary. Neither the Association nor any of its agents, employees or contractors shall be liable for any damage which may result from any maintenance work as performed nor shall the Association or any of its agents or employees be liable for any failure to exercise the right to also maintain any parcel or lot.

E. Disposal of Sanitary Waste. All permanent plumbing fixtures, dishwashers, toilets or garbage disposal systems shall be connected to the sanitary sewer system in the development.

F. Fences. Unless specifically restated in a supplemental declaration, the following general fencing guidelines shall apply. All property lines from single family dwelling houses to the street shall be kept free and open. There shall be no fences or walls over five (5) feet in height anywhere within the development without Committee